Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARA KIRSH and JOSEPH KIRSH,

Petitioners,

v.

THE CITY OF NEW YORK, THE COMMISSIONER OF THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, DAVID BRADLEY MANAGEMENT CO., DAVID WEISS, DEBBIE LEUNG, JOHN WELLS, SHEILA SAMMS, JANE AND JOHN DOE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD P. CARO, ESQ.
3 East Quincy Street
Riverside, Illinois 60546
(708) 447-5434

Counsel of Record for Petitioners

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

136 1P

QUESTIONS PRESENTED

1. Whether A Court Appointed Administrator Acted "Under Color of Law" Within The Meaning Of 42 U.S.C. § 1983 Where He Was Appointed Pursuant To A State Statute Upon Application Of A City Agency To Manage A Small Apartment Building To Do Approximately $54,000.00 In Emergency Repairs and To Penalize The Owners For Their Harassing Of Tenants, And Without Prior Court Authorization And Without The Owners' Prior Knowledge And Consent, Removes and Disposes Of All Their Personal Property And Leases Out Their Home To Strangers For Extended Periods Of Time?

2. Whether The Allegations That The City of New York (HPD):

   (A) Was Implementing The 7A Statute To Take Property Away From Its Lawful Owners and Not Return It To Them,

   (B) Had Failed To Properly Instruct 7A Administrators And HPD Managers Respecting Statutory Requirements, And Implementation Of The Terms And Conditions Set Forth In The 7A Judgment, And The Rights Of The Owners Of The Property And The Duties Owned The Owners While Their Property Was in 7A Administration, And

   (C) With Respect To The Kirshes' Property Had Regularly Disregarded The Terms And Conditions Of The 7A Judgment and Statute, Acquiesced In The 7A Administrators' Routine Disregard Of And Violations Of The Terms and Conditions Of The 7A Judgment, And

   (D) Failed To Take Any Corrective Action When It Learned Of The Unlawful And Unconstitutional Actions of the 7A Administrator,

   Sufficiently Alleged A Predicate For Municipal Liability Under 42 U.S.C. § 1983.

3. Whether In The Absence Of Prior Court Authorization Or The Owners' Consent, The 7A Administrator's Repeated Entries Into The Kirshes' Home, Removal And Disposition Of All Their Property Without Prior Or After The Fact Notice, And The Leasing Of Their Home To Strangers Violated The Kirshes' Constitutional Rights And Whether The Kirshes Had To First Exhaust State Remedies Where The 7A Statute Exempted The City From Liability And The 7A Administrator From Any Personal Liability?

4. Whether The Imposition Of 7A Administration For The Purpose Of Punishing The Kirshes For Harassing Their Tenants For An Indefinite Period And Putting The Burden On Them To Justify The Return Of Their Property And Home To Them Was In Violation Of The Kirshes' Constitutional Rights Under The Fifth And Eighth Amendments?

5. Whether The Kirshes' Injury Was Sufficient To Satisfy Standing Requirements For Them To Challenge The Constitutionality Of The 7A Statute On Its Face Or As Applied?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Mara Kirsh and Joseph Kirsh, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The United States Court of Appeals for The Second Circuit summarily affirmed the judgment of the United States District Court for the Southern District of New York (Sweet, D.J.) on the basis of the District Court's decisions. ___ F.3d ___ (June 15, 1998). The Second Circuit's Order Affirming the District Court and the three decisions of the District Court (1995 WL 383236, 1995 WL 679242, and 1997 WL 375684) are reproduced as Appendices A, B, C, and D.

STATEMENT OF JURISDICTION

This Court has jurisdiction of the Petition and the orders, decisions and judgments for which review is being sought pursuant to 28 U.S.C. § 1254 and Supreme Court Rule 13.

STATEMENT OF THE CASE

A. Summary Of The Facts

1. *The 7A Statute And Overview Of The Facts*

In 1965 New York State enacted a special statute to deal with dangerous conditions in multiple dwellings of five or units for New York City and the Counties of Nassau, Suffolk, Rockland and Westchester. The statute, Article 7A of the Real Property Actions and Procedures Law of the State of New York ("RPAPL") §§ 769-82,[1] allows a municipality or the tenants of a building to apply to place

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[1] The relevant provisions of the 7A statute are reproduced in Appendix E.

a building under 7A administration to do emergency repairs necessary to protect the life, health and safety of the residents. Upon completion of the needed repairs, the statute contemplates termination of the 7A Administration with return of managerial control of the property to its rightful owner. In 1982 Section 770 of the 7A Statute was amended to allow a 7A proceeding to be initiated for "a course of conduct by the owner or his agents of harassment,[2] illegal eviction, continued deprivation of services or other acts dangerous to life, health and safety."

This case concerns the application of this statute by the City of New York and the wrongful, consistent disregard by the City and the Administrators it had selected of the very terms and conditions set by the court in the 7A Judgment. As a result Mara and Joseph Kirsh have suffered egregious deprivations of their fundamental constitutional rights, both property and personal.

On March 1, 1988, upon the application of the Commissioner of the Department of Housing Preservation and Development of the City of New York ("HPD"), the Kirshes' property was placed in 7A Administration to do $54,000.00 in emergency repairs[3] and an extended period of 7A Administration was imposed at the City's request as punishment for their alleged harassing of their tenants[4] for a period not shorter than five years.[5]

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[2] The acts constituting "harassment" were not defined in the 7A statute.

[3] Appeal Appendix Vol. I at 813, and ¶8 at 815. Hereinafter the Appeal Appendix shall be referred to as "R."

[4] One of the alleged acts of harassment was the banging on a tenant's apartment door late at night which was presumed to have been done by the Kirshes.

[5] HPD had instituted an *in-rem* action in the Civil Court of the City of New York, Housing Part, on or about July 27, 1987. The Kirshes' request for a jury trial was denied and they were not allowed any discovery.

In August 1988, Mara Kirsh was enjoined from going within ½ mile of the building while the property was in 7A Administration[6] and HPD advised the Kirshes that the injunction also applied to Joseph Kirsh. Since the Kirshes lived in the building, their home being the ground floor rooms,[7] and being denied any part of the rental income for personal daily living expenses and basic needs, the bar was especially punitive, onerous and impoverishing for the Kirshes.

Although more than ten (10) years have elapsed since their property was placed in 7A Administration, the City has not returned control of their property to them and they still can't go home and have never been paid any surplus money.[8] They are, consequently, still being punished and in September 1994 they learned that HPD stated that it did not intend for them to ever get control of their property back.[9]

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[6] HPD had petitioned the court to hold Mara Kirsh in criminal contempt for interfering with the Administrator. The facts are set forth in *Kirsh v. Michetti*, 787 F. Supp. 403, 404-05 (S.D.N.Y. 1992).

[7] The 7A Judgment allowed the Kirshes to have exclusive use of the ground floor rooms without having to pay rent. R-II at 976. (Affidavit of HPD Official Frank Vera.)

[8] The 7A Judgment set forth the priority of expenditures that could be made after the emergency repairs for which 7A administration was imposed. Included in this list was payment of the balance of money left (the "surplus") to the owners. R-I at 36-37. Plaintiffs estimated that as of September 1996 approximately $500,000.00 in rental income have been received, the disbursement of which had not yet been accounted for—at least to them, The emergency repairs for which the 7A Administration was imposed to correct were deemed by the state court to have been long completed by the time it ordered the property taxes to be paid in September 1991. (Statements of N.Y.S. Supreme Court Justice Paula J. Omansky, OR-II at 848.)

[9] In September 1994, Mara Kirsh's mother inquired of New York City's Small Property Owner's Advocate when the property would be taken out of 7A Administration and returned to the daughter and son-in-law and, in response to her inquiry, she was subsequently informed that according to HPD the Kirshes would never get their building back. (R-I at 352-53.) This

(continued...)

Over the years the Kirshes complained to HPD and the court, basically to no avail, that the terms and conditions of the 7A Judgment were not being adhered to by the 7A Administrators. For example monies were being expended in violation of the decree's restrictions and required court authorization wasn't being sought. In addition property taxes weren't being paid, as the 7A Judgment required,[10] and surplus monies were not paid over to the Kirshes,[11] also as the decree required.

The 7A Judgment also required the Administrator to file monthly reports with the court and to personally appear before the court at intervals not less than 60 days. Notwithstanding, the monthly reports were not filed with the court and the Kirshes were also not being served with copies of the monthly reports and the required court appearances did not take place. Though the Kirshes complained to the Administrators, HPD and to the court, the disregard of these requirements of the 7A Judgment continued uncorrected and, in fact, with HPD's acquiescence, if not approval, as more fully explained below.

In October 1994 the Kirshes discovered that in 1993 the then 7A Administrator, without notice to the Kirshes and without their consent, and without applying to the court, removed and disposed of all of their personal property! They further discovered that in early

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[9] (...continued)
confirmed and was consistent with an announcement made shortly before HPD filed its 7A Petition. (R-II at 813-14.) At a press conference held on July 13, 1987, a high City official announced that the City intended to take the Kirshes' property from them and never return it to them.(R-II at 908.) Two weeks later, HPD filed its 7A Petition.

[10] In response to one of their complaints, the court ordered the taxes to be paid and the property removed from the City's *in rem* list of properties with delinquent taxes. R-II at 845, 848-57. The taxes were subsequently again not paid and the property again placed on the *in rem* list.

[11] The building's rental income was the Kirshes' sole source of income and the denial of any part of that income for their daily living expenses and basic needs resulted in their impoverishment and contributed to their decline in health.

1994, the 7A Administrator had rented out their home to strangers. Needless to say this too was done without the Kirshes' prior knowledge or consent, and without court authorization.

While there was some question of when HPD first knew, or should have known about these actions, by April 1994 HPD admitted it knew what had happened. Notwithstanding, HPD didn't take any corrective action and didn't even notify the Kirshes[12] or the court of the 7A Administrator's wrongful actions or seek his removal. After the Kirshes learned what happened, they attempted to get HPD to take corrective action, and when that failed, sought, to no avail, assistance from the Office of Corporation Counsel for the City of New York and from the Office of New York City's Mayor.

The Kirshes then instituted an action in the United States District Court for the Southern District of New York in November 1994 pursuant to 42 U.S.C. § 1983 against the City, HPD officials and the 7A Administrators. Relief was sought in federal court rather than in state court because the 7A statute in Section 778 immunizes the City from liability for the acts of the 7A Administrator and it exempts the 7A Administrator from personal liability.

2. *HPD And The 7A Administrators*

Under Section 778, subpar. 5, HPD establishes "the rules and regulations regarding criteria for the selection of [7A] administrators" and the court required is to appoint as 7A Administrators persons from HPD's list of qualified persons. HPD provides a mandatory 7A training course for the prospective administrators and has established the format and requirements for the 7A Administrator's monthly report and accounting, which under the 7A Judgment the 7A Administrator is required to comply with. The 7A Administrators were all selected and trained by HPD and appointed by the court upon HPD's application.

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[12] Since the Kirshes had repeatedly complained that they were not being sent the monthly reports, HPD knew or should have known that the Kirshes were unaware of what had happened.

Where HPD is the 7A Petitioner, as in this case, the HPD Commissioner or his designee may be the 7A Administrator. (Section 778 subpar. 1.) Here, HPD designated each of the persons who have acted as the 7A Administrator of the Kirshes' property as the Commissioner's designee. Each of these persons have been compensated for their services out of the property's income. (Section 778, subpar. 2.)[13]

In addition in all court proceedings relating to the property's being in 7A administration, with the exception of the present case,[14] City attorneys, either HPD staff attorneys or attorneys from the Office of Corporation Counsel of New York, have represented the 7A Administrators in litigation with the Kirshes.

David Weiss, the 7A Administrator who disposed of the Kirshes' property and leased out their home, testified that in the 7A training course he attended, he received no instruction on the 7A statute, on the owner's rights or on the 7A Administrator's obligations to pay the property taxes or the surplus income to the owners.[15]

In addition, HPD supervises and oversees the 7A Administrators.[16] HPD assigns an HPD official to be the 7A Manager of the property and Counselor to the 7A Administrator. This HPD official is responsible to see that the repairs required by the 7A Petition and Judgment are made and that the property is otherwise managed in accordance with the requirements, terms and conditions of the 7A Judgment. To this end HPD also has a specific 7A training course

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[13] Since the Kirshes objected to and opposed the imposition and continuation of 7A administration, use of their property's income to pay the 7A Administrator's fee was not voluntary on their part.

[14] In this case, Corporation Counsel requested the District Court to dismiss the claims against the 7A Administrators who had defaulted after initially appearing in the action.

[15] R-I at 525-27, 538-41.

[16] HPD may seek the removal of any 7A Administrator that refuses to follow its instructions and regulations.

for its employees who will fill this position. In this case Ms. Sheila Samms testified that she attended a sixteen week training course.[17]

The HPD 7A Manager and 7A Administrator enter into a compliance agreement for each property in 7A administration setting forth the goals for managing the property in accordance with the requirements of the 7A Judgment (¶ 11c) and the 7A statute. A new compliance agreement is executed annually, or more frequently, if necessary. The HPD Manager inspects the property, reviews the monthly reports and re-visits the property periodically, or as necessary, to verify certain work has been done, or that there is a vacancy, or when there has been a large expenditure, or if a problem arises.

According to Ms. Samms, the terms, conditions and requirements that were to be followed were those set forth in the 7A Judgment. However, Ms. Samms testified that upon her assignment as 7A Manager to the Kirshes' property she was not given a copy of the 7A Judgment, did not try to obtain a copy or find out what the 7A Judgment required[18] and first saw it when she was served with the Summons and Complaint.[19] The only court order that she had was that appointing David Weiss as the 7A Administrator. Accordingly, she didn't know what emergency repairs were required by the 7A Judgment and thus was in no position to determine what additional work required court approval. As a result, she wasn't in a position to assure that the 7A Judgment was being followed and properly implemented. She testified further that under the circumstances that her only concern was to see that the rents were collected and the rent money spent on the property.[20]

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[17] R-I at 449-50, correction at 501.

[18] R-I at 451.

[19] Ms. Samms also testified that she was never told prior to April 1994 by her supervisor or any other HPD official that the owners had an apartment in the building and were allowed under the 7A Judgment to keep their home or that the property taxes were to be paid. R-I at 45, 460-61, 474-75, 486-89.

[20] R-I at 456-57, 498.

Ms. Samms also testified that one of the responsibilities of the HPD 7A Manager was to look after the property owner's interests since the owner is usually barred from the property.[21] However, she was never instructed concerning what the owner's rights were and did not herself know what they were.[22] Furthermore when she read the reports indicating that furniture, appliances, equipment, clothes, etc were being removed, she never sought to ascertain whose property was being removed and disposed of. All she did was visit the building to make sure that the work was being done.[23] When she finally learned in April 1994 that the ground floor rooms were the Kirshes' home, neither she nor her supervisor took any corrective action, or notified the Kirshes or the court or sought Weiss removal. In fact, Weiss testified that HPD never instructed him to terminate the illegal leases or not to renew them.[24]

Weiss defended all his actions as being authorized by the original 7A Judgment.

3. *Defendants' Consistent Failures To Comply With the 7A Judgment*

The 7A Judgment[25] specifies the limited authority and obligations of the 7A Administrator. First, the 7A Judgment imposed a monetary limit on what could be spent without prior judicial authoriza-

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[21] R-I at 451-52, 471-73.

[22] R-I at 450-54.

[23] Removal and disposition of the Kirshes property took place in June, September and October 1993. The volume of material removed was astonishing: 84 truck loads and four (4) 30 yard dumpsters, at a cost of $8720.00 which was well in excess of the $3500.00 limit authorized by the 7A Judgment.

[24] The front room was leased to a commercial tenant for five years—which was in violation of Section 778 subpar. 1 of the 7A statute. The rear ground floor rooms were leased to a residential tenant for one year term and renewed even after the Kirshes objected and instituted this action.

[25] The 7A Judgment conforms with the 7A statutory requirements.

tion. Paragraph 7 of the 7A Judgment required prior court for "any contract for repairs and services in an amount in excess of $3500.00 ***. (R-I at 35.) This limitation was repeatedly ignored by the 7A Administrators[26] and according to Ms. Samms, HPD routinely allows and acquiesces in 7A Administrators' submitting partial invoices so as to avoid having to apply for court authorization. (R-I at 466-67; 469.) Here, this practice allowed, *inter alia*, Mr. Weiss to pay for the removal and disposal of the Kirshes' property from the building at a cost of $8720.00, without prior court approval.[27]

Second, the 7A Judgment set the priority of expenditures (¶ 9, R-I at 36-37), requiring first that monies be spent to do the repairs listed in HPD's Petition and prohibited any other expenditures except for fuel, ordinary repairs and maintenance, insurance, repayment of loans taken to do the repairs listed in the Petition, and a reasonable fee to the Administrator. Property taxes were then to be paid, then any outstanding emergency repair expenses and liens and then the surplus was to be paid over to the owners of the property. If the 7A Administrator wished to do other repairs, including ones of an emergency nature, prior court authorization had to be obtained. (¶ 10, R-I at 37.) Notwithstanding these provisions, none of the 7A Administrators ever applied to the court to do any additional repairs, repeatedly failed to pay the property taxes except once when the court ordered HPD to have them paid,[28] then

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[26] For example, according to the July 1993 Monthly Report Mr. Weiss paid Acme Construction $4428.25 for water pipe work. R-II at 1046.

[27] The removal of the Kirshes' property consisting of furniture, appliances, equipment, motorcycles, clothes, etc.,was reported to have required 84 truck loads and four 30 yard dumpsters. R-II at 1047, 1224, 1226; R-I at 688. Mara Kirsh attested that their home contained antique furniture, an antique and modern Leica camera collection, jewelry, poetry, art work and paintings, family correspondence and memorabilia. R-II at 902-04. No record of the items removed and disposed of was made and Ms. Samms never inquired what and whose property was being removed and disposed of though it was part of her official responsibilities to look after the owners' interests since the owners are usually barred from the property. R-I at 451-52, 471-73.

[28] R-II at 848.

failed to pay them again, and never paid any money over to the Kirshes.[29]

The 7A Judgment in Paragraph 11 (R-I at 37-38) requires the 7A Administrator to personally appear before the court "at intervals not less than sixty (60) days on dates and times set by the Court" to report to and review the management and operation of the premises, the monthly financial reports and to provide the court with any other report it or HPD requested. The 7A Administrator is also required to file with the court and HPD[30] a monthly report of the receipts and expenditures made, and any other information requested, before the 20th of each month for the preceding month. All vacancies had to be reported to the court and if the vacancy lasted more than 30 days, then the Administrator had to submit an application for the Emergency Assistance Rehousing Program for renovation and renting of the vacant apartment. Except for the filing of the monthly report with HPD, none of these requirements were complied with, notwithstanding complaints made by the Kirshes to HPD and the court.[31]

Finally, when any 7A Administrator resigned, a final report setting forth a full accounting was also required to be filed with the court and served on the parties as a condition to their withdrawal. Though there have been four 7A Administrators to date, none of the three who resigned and relieved of their 7A Administrative re-

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[29] R-II at 908; R-I at 444.

[30] Since the Kirshes were parties to the 7A action, the monthly report was also required to be served on them under New York State's Civil Practice Law Rules ("CPLR") 2103(e).

[31] By letter and by proceedings they initiated in state court, the Kirshes repeatedly complained that the reporting requirements were not being complied with and that property taxes were not being paid as required. R (Exhibit Volume) at 141-43, 176-77, 190-95, 205-06, 249, 250; R-I at 443-44; R-II at 848, 908-09. *See also* transcript of New York Supreme Court Justice Omansky's order requiring property taxes to be paid. R-II at 856-58 and Report of the Finance department of New York City that property was placed *in rem* for failure to again pay the property taxes. R-II at 884-89.

sponsibilities filed any such final report or served Plaintiffs with one.

Thus as implemented, the routine, ongoing and close court oversight and supervision required by the 7A statute and Judgment were never had.[32] Presumably the court relied on HPD to make sure the law and its decree were being followed but HPD adopted a policies, practices and procedures that encouraged and facilitated, if not approved of, the routine disregard of all the terms, conditions and restrictions applicable to the administration of the property under the 7A Judgment.

4. *Plaintiffs' Prior Applications For Relief From State Court*

Prior to the institution of this action the Kirshes applied to the local courts for relief four times, and repeatedly brought to the court's attention, and HPD's, the fact that the terms, conditions, and restrictions of the 7A Judgment were being routinely disregarded, including that they were not receiving the monthly reports, that the 60 day court appearances were not being had, that the property was not being properly maintained and managed and that the property taxes were not being paid. They also requested that the 7A Administration of their property be terminated and that they be allowed to return to their home.[33] In 1991 the Court ordered the property taxes paid and the property be removed from *in rem* proceedings for failure to pay the property taxes. This was done but subsequently,

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[32] Had discovery been allowed with respect to other properties in 7A Administration, Plaintiffs believe that they would have been able to show that these practices were not the exception but common place.

[33] Plaintiffs' applications to State Court were made on November 7, 1988, November 7, 1989, June 6, 1990, and June 12, 1991. R-Ex. Vol. at 103-35, 130-67, 185-229, 230-75, respectively. While preparing a fifth, they were arrested and subsequently convicted of sending threatening letters to people and organizations. *United States v. Kirsh*, 54 F.3d 1062 (2d Cir), *cert. denied*, 516 U.S. 927 (1995). The Second Circuit recently ordered a Habeas Corpus hearing be held.

the taxes again were not paid and *in rem* proceedings again initiated.[34]

5. *The City's Policies, Customs And Practices In Its Application Of The 7A Statute*

The original Complaint (Appendix F) alleged that the City was applying the remedies available under the 7A statute as a means of taking property from the owners without just compensation and that the Kirshes' case was an example of this.[35] The City was doing this by instituting 7A proceedings without disclosing its true intent never to return the management of the property to the rightful owners. Instead, as the evidence developed in this case showed, the City by not returning management of the property to the owner when the emergency repairs were made or at the end of an extended term imposed as punishment, and by not requiring its designee 7A Administrators to strictly follow the 7A Judgment, including requiring the payment of property taxes, was proceeding in a way that would cause the owner of the property to lose title to the property as a result of a tax sale or foreclosure. Though the District Court denied all discovery on this issue, and though the City publishes no reports on the number of properties under 7A Administration, the duration of 7A Administration and the ultimate disposition of those properties, the evidence showed that:

– HPD did not instruct either the prospective 7A Administrators or HPD 7A Managers concerning the owners' rights, the obligation under the statute or 7A Judgment to pay the property taxes and surplus to the owners. Where 7A administration is imposed for an

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[34] R-II 848-57. See also HPD's Settlement Stipulation dated August 14, 1992, that the property would again be taken out of *in rem* proceedings and not be listed for tax sale. Notwithstanding, the property was placed and remained on the *in rem* list. R-II at 884-89.

[35] The Proposed Amended Complaint set forth the City's Policies, Practices and Customs, actions and omissions in detail that caused or contributed to the constitutional violations in detail. R-II at 947-57.

extended term as punishment, these provisions are important provisions protecting the owners' interests.

– HPD disregarded, acquiesced in and acceded to the 7A Administrators routine disregard of the requirements, terms and conditions of the 7A Judgment, to the detriment and violation of the owners' rights and interests under the court degree and the laws of the State of New York.

– HPD did not require its designee 7A Administrators to file the monthly reports with the court or to serve the owners with a copy of the monthly report, or otherwise to appear and report to the court as the 7A Judgment required, thereby assuring that there would be no regular public accounting or exercise of judicial oversight that both the statute and the Judgment required.

With respect to the Kirshes, that HPD had no intention of having management of the property returned to them, or any concern for their rights is evidenced by not only the above practices which occurred with respect to their property, but HPD's failure to provide Ms. Samms with a copy of the 7A Judgment so she could do her job and her own failure to acquire a copy of the 7A Judgment, and by HPD's failure to take any corrective action once it learned what Weiss had done with respect to the Kirshes' home and personal property.

B. Proceedings in District Court

1. *The Original Complaint*

The Complaint sought to terminate the 7A Administration of the Kirshes' property and other equitable and legal relief, including damages, for violations of their federal and state constitutional rights and their rights under state law. In the First Claim, the Kirshes alleged that the Respondents had:

> "intentionally or with reckless and callous disregard of [their] rights entered, or caused, or authorized others to enter, remove and dispose of Plaintiffs' personal property and lease and rent

> Plaintiffs' [home] *** to other persons or entities, without prior notice to Plaintiffs and a hearing before a court with jurisdiction, or acceded to or acquiesced in these unlawful and unconstitutional acts. Defendants have thereby taken, removed, destroyed, disposed of and otherwise deprived Plaintiffs of their home and property and violated their constitutionally protected liberty and privacy rights and interests without Due Process of Law ***. ***"

The Second Claim alleged with respect to both their personal and real property Respondents' actions were in violation of the Just Compensation Clause.

The Third Claim alleged that the numerous entries into their home, searches and seizures, removal of their personal property and rental of their home to others, constituted violations of their constitutionally protected rights under the Fourth and Ninth Amendments, including their privacy rights,

> "to be secure in their persons, houses, papers and effects against unreasonable seizures, not to have their property seized except upon issuance of a warrant [issued] by a neutral magistrate upon a showing of probable cause, and not to have the sanctity of their home and their fundamental privacy interests violated by unwarranted governmental intrusions."

The Fourth Claim alleged that Respondents' not returning control of their property to them and lifting of the injunction barring them from their home, in themselves, and cumulatively with the other deprivations, were in violation of the Eight Amendment's prohibitions against cruel and unusual punishment and excessive fines.

In the Fifth Claim the Kirshes challenged the constitutionality of the 7A statute on its face under the Equal Protection Clause since it only applied to a few counties in the State of New York and, in the Sixth Claim, as applied by the City of New York, under the Due Process and Just Compensation Clauses because the City was having buildings placed under 7A Administration with the secret intent that control of the property would never be returned to the owner

and that the City would subsequently acquire title to the property as a result of the property taxes not being paid.[36]

Finally, the Seventh and Eighth Claims alleged that the Respondents had breached their fiduciary duties and had mismanaged the property in violation of the 7A Judgment and applicable professional standards of care.

2. *The District Court's First Partial Dismissal Decision*[37]

(a) The First And Third Claims

In its first decision the District Court granted in part the City's motion for dismissal. It dismissed the First and Third Claims as against the City because it found that the Complaint did not adequately allege a basis for municipal liability.[38] The District Court also dismissed these Claims as against the HPD Commissioner[39] but not as against Ms. Samms.

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[36] The District Court did not allow Plaintiffs to have any discovery in connection with these claims and the information about properties that the City had placed in 7A Administration is not otherwise available under a Freedom of Information Act request or in any City published report.

[37] 1995 WL 383236, Appendix B.

[38] The proposed Amended Complaint (Appendix G) sought to cure any of the technical pleading deficiencies but the District Court found that pleading deficient too notwithstanding its detailed, specific allegations. It should also be noted that the District Court denied Plaintiff all discovery except with respect to Samm's knowledge and even with respect to that issue discovery was limited to her log entries. Her reports to her supervisor, his instructions to her, correspondence, the reports and notes of the inspector who accompanied her to the building, the compliance agreements and the deposition of any one other than Samms and Weiss were not allowed.

[39] Plaintiff had sought injunctive and equitable relief against the Commissioner.

(b) The Just Compensation (Second) Claim

The District Court dismissed the Second Claim that there had been a taking without Just Compensation of their personal property, home and the building. With respect to the building and its income, the District Court held that there had only been a temporary regulatory taking that did not go too far nor deny them the expected economic benefits of their investment. With respect to the leasing out of their home, the District Court held that it was not a permanent taking because it could be recovered upon expiration or termination of the tenancies. Finally, with respect to their personal property,[40] the District Court held that the claim was not ripe because the Kirshes had not alleged that they applied for available statutory remedies notwithstanding the fact that the 7A statute exempted the City from liability for the Administrator's actions and that the 7A Administrator's liability was limited to his official capacity.

(c) The Fourth Claim

The District Court dismissed the Fourth Claim on the grounds that the term of 7A Administration was a sanction to secure compliance, the Kirshes could apply for termination of 7A administration and could correct the conditions for which 7A administration was imposed.

(d) The Fifth And Sixth Claims

The District Court held that the Kirshes lacked standing to challenge the constitutionality of the statute on its face or as applied

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[40] Except for some motorcycles and motorcycle parts, all of the Kirshes' personal property had been disposed of. During the course of the litigation the City disclosed that the motorcycles and motorcycle parts were placed in storage and Plaintiffs learned that the storage fees were never paid. R-II at 934.

under the Due Process and Just Compensation Clauses[41] because the Complaint failed to allege that there had been a final decision or that adequate state remedies were unavailable.[42] In its second decision the District Court also dismissed the Kirshes' Equal Protection Claim.[43]

3. *The District Court's Dismissal Of The Claims Against Weiss And Samms*[44]

The District Court[45] subsequently granted Weiss' motion for summary judgment and dismissed all the claims against him. The District Court held that as a 7A Administrator, Weiss was not a state actor under 42 U.S.C. § 1983 and that his actions did not constitute state action under Section 1983.

With respect to Samms, the District Court also granted her motion for summary judgment finding that there was no factual dispute that she had authorized Weiss' actions or found out about them prior to April 1994. In so concluding, the District Court not only disregarded the evidence that Ms. Samms did know what Weiss was doing, the credibility issues respecting her testimony about what she knew and when,[46] her failure to take any remedial action or to

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[41] All discovery requests made with respect to this claim were suppressed by the District Court. The information sought respecting the City's implementation of the 7A statute is not publicly available or available on a Freedom of Information Act request.

[42] The proposed Amended Complaint included such allegations, with detailed supporting facts. (¶s 16-25, App. G.)

[43] No discovery was allowed on this issue either.

[44] 1997 WL 375684, Appendix D.

[45] The District Court also denied Plaintiffs' motion to amend their Complaint and for additional discovery.

[46] The scope of discovery that the District Court allowed was unduly and improperly limited. Plaintiffs were denied discovery, for example, of her reports to her superior, her superior's notes and records respecting his

(continued...)

notify the Kirshes or the Court. Finally, the District Court did not address the alternative bases for Section 1983 liability that the Plaintiffs had advanced.[47]

C. The Decision Of The Second Circuit

On appeal to the United States Court of Appeals for the Second Circuit, the Court entered a summary order affirming the District Court on the basis of its three decisions.

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[46] (...continued)
instructions and communications with her respecting the Kirshes and their property, the notes and reports of the building inspector who accompanied her on her visits to the property, any correspondences and notes of communications with Weiss, and Weiss' to and with her. Plaintiffs were also denied access to the 7A file on their building to ascertain if in fact Ms. Samms had the 7A Judgment in that file and were not allowed to depose any other HPD official so it could be ascertained what Ms. Samms knew and when respecting the Kirshes and their property.

[47] The alternative predicates were:

– the existence of municipal policies, customs and practices that caused or led to the violations, gave rise to the deliberate indifference to the Kirshes' constitutional rights and contributed to the violations, including the decision that the Kirshes would never get their property back,

– the inadequacy and failings in the training of 7A Administrators and their HPD 7A Managers,

– the failure of 7A Administrators, with the knowledge, acquiescence and tacit approval of HPD, to adhere to terms and conditions set forth in 7A Judgments, and

– the failure of City officials to take corrective action but rather acceding, acquiescing and approving violations of the terms and conditions of the 7A Judgments, and the property owners' constitutional rights.

REASONS FOR GRANTING THE WRIT

I.

THERE'S A CONFLICT AMONG THE CIRCUITS RESPECTING 1983 LIABILITY OF PERSONS APPOINTED BY COURTS AS TO WHETHER THEY ARE ACTING UNDER COLOR OF STATE LAW

There is a conflict and inconsistency among the United States Courts of Appeals for the Second, Third, Fourth, Seventh, Ninth, and Tenth Circuits respecting the issue of whether a person appointed by a court to fulfill a certain function is acting "under color of law" for the purposes of determining liability under 42 U.S.C. § 1983.

In addition to the present case,[48] the Seventh Circuit held in *Loyd v. Loyd*, 731 F.2d 393, 398-99 (1984) that a court appointed administrator of an decedent's estate is not acting under color of law within the meaning of Section 1983. Similarly, the Tenth Circuit in *Meeker v. Kercher*, 782 F.2d 153 (1986) with respect to a court appointed guardian *ad litem* in a child abuse case, held that the court appointed guardian was not acting under color of law. In both of these latter cases, the courts construed that person in question was performing traditionally private activity rather than a state function irrespective of whether the appointment was pursuant to a state statute, subject to judicial control and review, or coercive.

The Fourth Circuit in *Thomas S. v. Morrow*, 781 F.2d 367, 377-78, *cert. denied*, 476 U.S. 1124 (1986), also involving a guardian *ad litem* for a person adjudged incompetent appointed pursuant to a statute, the Third in *Hohensee v. Grier*, 373 F. Supp. 1358, 1363-64 (M.D. Pa. 1974), *aff'd*, 524 F.2d 1403 (3rd Cir.), *cert. denied*, 426 U.S. 940 (1975), respecting a court appointed receiver of a corporation with plenary authority and appointed pursuant to an ex-

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[48] The District Court's reliance on the IBT Teamsters cases was misplaced. There the Administrator was appointed pursuant to a private agreement of the parties and was voluntarily paid by the parties. *United States v. Int'l Brotherhood Of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 941 F.2d 1292, 1295-96 (2d Cir. 1991).

traordinary exercise of the state court's equitable jurisdiction and subject to its control, and the Ninth Circuit in *Lebos v. Judges of the Superior Court, Santa Clara Cty.*, 883 F.2d 810, 817-18 and n.10 (1989), with respect to a court appointed receiver, appointed pursuant to a state statute, to collect a judgment against an attorney, held that the court appointed individuals were acting under color of law for the purposes of establishing their liability under Section 1983.

The Second Circuit's decision in this case can not be reconciled with the decisions in the latter four cases. The factors the District Court relied on to support its conclusion that there was no state action were either not determinative under this Court's prior decisions or actually supported the opposite conclusion. For example, though this Court held that whether the person is employed or not by the state or other governmental unit is not determinative,[49] *West v. Atkins*, 487 U.S. 42, 51 (1988), the District Court placed substantial reliance on that fact Weiss was not a City or State employee. (1995 WL 383236 at 3, Appendix B; 1997 WL 375684 at 5, Appendix D.) The lower court also relied on the fact that the 7A Administrator was not paid by the City or the State[50] (1997 WL 375684 at 6, Appendix D), even though the 7A Administrator was paid from the rental income, which is money belonging to the Kirshes, against their will, pursuant to a state statute and under court order—an obvious exercise of state power. *See Lugar v. Edmondson Oil Co. Inc.*, 457 U.S. 922, 940-41 (1982), holding that private party's use of constitutionally deficient statutory remedy for private purposes was sufficient to establish joint action with state for satisfying "under color of law" requirement for 1983 action.

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[49] The issue rather is whether Weiss "was acting under authority explicitly or implicitly delegated by the State when he carried out the challenged actions." *Morse v. Republican Party of Va.*, 517 U.S. 186, 116 S.Ct. 1186, 1208, 134 L.Ed.2d 347 (1996).

[50] *Cf. Polk County v. Dodson*, 454 U.S. 312, 320-21 (1981) holding that the fact that a public defender is paid by the state is not enough to establish state action under Section 1983.

Similarly, the court's reliance on the fact that "[t]he 7A Administrator acts according to the provisions of a compliance agreement ***" (1997 WL 37684 at 6, Appendix D) is also not helpful because the "compliance agreement" here was not between private parties but between HPD and the 7A Administrator, which was mandated by the 7A statute, and required by the 7A Judgment, indisputably a state imposed requirement.

Finally, the District Court in interpreting the 7A Administrator as acting on behalf of the tenants to correct the hazardous conditions for which 7A administration was imposed to correct, *ibid* at 5, disregarded several important factors:

– First, the HPD Commissioner brought the Petition in his own name and not on behalf of the tenants and selected the 7A Administrator as his designee for administering the property.[51]

– Second, the 7A Administrator is acting pursuant to a complex statutory scheme and judicial order, subject to monitoring and supervision by a public agency and the court according to state established standards. *Cf. Blum v. Yaretsky*, 457 U.S. 991, 1003-05 (1982) holding that where the state does not impose the standards that are to be applied in making a particular decision, but the standards are independently set by the profession, an insufficient nexus exists to establish a right of action under Section 1983.

– Third, the 7A Administrator is claiming personal immunity pursuant to the 7A statute's limiting his liability to his "official

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[51] Under the City's espoused point of view that the 7A Administrator is not subject to its supervision and control, the 7A Administrator would be the person with plenary authority over the property, making all administrative and policy decisions. If so there would be state action, *cf. Jett v. Dallas Indep. Sch. Dis.*, 491 U.S. 701, 737-38 (1989) holding that municipal liability may exist where official with delegated authority is final decision maker, policy maker; and *Pembaur v. Cincinnati*, 475 U.S. 469, 485 (1986) person acting as final decision maker for municipality sufficient to establish predicate for municipal liability. Weiss, on the other hand, claimed he was subject to the control and supervision of HPD and entitled to personal immunity under the 7A statute, with which the District Court, in *dicta*, agreed. 97 WL 375684, at 10-11, n. 3, Appendix E.

capacity," which is clearly inconsistent with the proposition that the Administrator is not a state agent.[52] *Cf. Wyatt v. Cole*, 504 U.S. 158, 168 (1992), holding that immunity for 1983 violations is not available to private persons.[53]

– Fourth, the 7A Administrator was fulfilling the regulatory and police powers vested in HPD with respect to correcting the hazardous conditions cited in the 7A Petition and after they had been remedied, managing the property for the extended term of 7A Administration as statutorily authorized and judicially imposed punishment, a " 'traditionally **exclusive** prerogative of the State.' " *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982), quoting with emphasis added *Blum v. Yarestsky, supra*, 457 U.S. at 1011.

– And, finally, the bar against the Kirshes going within ½ mile of the building was imposed on Mara Kirsh by the court as punishment for criminal contempt and extended by HPD to Joseph Kirsh pursuant to its authority as a regulatory agency and as an exercise of its governmental police power. (The tenants didn't have either the regulatory or police power to so punish the Kirshes.)

To resolve the conflict and clarify the law is this area, especially with regard to the criteria to be applied to determine when a person appointed by a court is fulfilling a private function and not acting under color of law within the meaning of Section 1983 the writ of certiorari should issue.

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[52] The District Court also strongly suggested that the 7A Administrator was entitled to the benefits of judicial immunity. 1997 WL 375684 at 10-11, n.3.

[53] States are not able to exempt persons from liability under Section 1983 which is a matter for Congress to decide. *Tower v. Glover*, 467 U.S. 914, 920-22 (1984).

II.

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT ON IMPORTANT QUESTIONS OF FEDERAL LAW

A. THE DECISIONS BELOW THAT THERE WAS NO ADEQUATE PREDICATE FOR MUNICIPAL LIABILITY CONFLICT WITH AND FAIL TO FOLLOW THE DECISIONS OF THIS COURT

The Kirshes advanced five predicates for municipal liability: First, with respect to the loss of their personal property, the invasions into their home and the leasing of their home, that Weiss' wrongful acts would never have occurred had the HPD required him to strictly adhere to the requirements and procedures set forth in the 7A Judgment and statute, and had properly trained him and HPD's 7A Managers with respect to the proper implementation of 7A Judgments, with due regard for the property owner's rights and the obligations owed the property owner.[54]

Second, that the City's long term and routine disregard of those mandatory provisions, acquiescence in and ratification of practices in violation of or in non-compliance with the 7A Judgment and statute were contributory causes and constituted a policy, custom and practice that was illegal, an unlawful implementation of the 7A program, and in violation of the owners' constitutional, property, proprietary and other personal rights.

Third, that the City in exercising its rights and powers under the 7A statute had adopted and pursued a policy to exercise its rights and powers under the 7A statute to take control of properties away from the lawful owners with the intent never to return the property to the owners and eventually acquiring title as a result of non-payment of property taxes and that pursuant to this policy the City allowed, encouraged and acquiesced in the 7A Administrators dis-

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[54] Had the 7A Administrators been appearing every 60 days before the court, as required, it is unlikely that any of the wrongful conduct would have occurred. Similarly, if the Kirshes been served with the monthly reports, it would have been unlikely that Weiss would have ever attempted to remove their property from their home.

regarding the 7A Judgment, allowed the property taxes not to be paid and the property placed into *in rem*, and announced that the Kirshes would never get their property back.

Fourth, that the City and the 7A Administrators acted in concert to implement the 7A program in such a way that the owners' rights were disregarded and to achieve the City's unlawful and unconstitutional objectives.

Fifth, that once the City had actual notice that the 7A Administrators were not acting in compliance with the 7A Judgment or in violation of the statute, that Weiss was removing the owners' property from the building and then leasing out their home, the City, as both the responsible party litigant, and the responsible governmental entity, was obligated to take corrective action and here, instead, it had consciously disregarded and ratified the violations of the 7A Judgment and statute, and the Kirshes constitutional and other personal and property rights.

In rejecting these theories the lower courts failed to follow and properly apply the decisions of this Court respecting municipal liability under Section 1983. This Court has recognized that under Section 1983 municipal liability may be predicated upon a number of bases or theories, including the existence of a formal or informal policy, widespread custom or established practice that directly caused or contributed to the constitutional violation, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694-95 (1978), *Board of the Cty. Commissioners of Bryan Cty. v. Oklahoma*, 520 U.S. 397, 117 S.Ct. 1382, 1390, 137 L. Ed. 2d 626 (1987), or indirectly caused, contributed or led to the alleged constitutional violation, as, for example, the result of inadequate training or deliberate indifference to a known need or one that should have been anticipated. *City of Canton Ohio v. Harris*, 489 U.S. 378, 387-90 (1989). Deliberate indifference contains a "conscious disregard" element that may be satisfied by either continued adherence to an approach that is known or should be known to have failed to prevent the wrongful conduct or by the acquiescence in a pattern of constitutional violations. *Id.* at 397, and 390-91 (O'Connor, J. concurring), cited and quoted in *Board of the Cty. Commissioners of Bryan Cty. v. Oklahoma, supra*, at 1390. Liability may also arise where upon

learning of a constitutional violation there is a duty to act to correct the violation and corrective action is not taken. *Gebser v. Lago Vista Indep. Sch. Dis.*, ___ U.S. ___, 118 S. Ct. 1989, 1999-2000, 141 L.Ed.2d 277 (1998) applying 1983 jurisprudence to Title IX and concluding that if responsible official had actual knowledge of discrimination there would be a duty to take corrective action and the failure to do so would be actionable. Here, in addition to repeated complaints that the 7A Judgment was not being adhered to, for and extended period of time HPD officials knew of the egregious constitutional violations regarding the Kirshes' home and personal belongings and made conscious, deliberate decisions not to take any corrective action. As this Court observed in *County of Sacramento v. Lewis*, ___ U.S. ___, 118 S. Ct. 1708, 1720, 140 L.Ed.2d 1043 (1998):

> "*** When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking. ***"

HPD has also disregarded for more than ten (10) years the violations of the 7A Judgment that the Kirshes repeatedly complained of.

The District Court dismissed the Kirshes' allegations respecting not only the City's unconstitutional implementation of the 7A Judgment in this case and others, but also the averments that it was failing to comply with the terms, conditions and restrictions in the 7A Judgment and statute as part of its decision not to ever allow the Kirshes to regain control of their property, but also of the broader policy that it was using the 7A program to unconstitutionally take properties from their rightful owners in violation of owners' due process rights and right to just compensation. In so doing not only were the decisions of this Court respecting the applicable standards not followed, but the also this Court's decision that a heightened pleading standard is not applicable to a 1983 complaint. *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993).[55]

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[55] The proposed Amended Complaint was drafted to over come the District Court's objections to the sufficiency of the pleadings.

B. THE LOWER COURTS' RULINGS WITH RESPECT TO EXHAUSTION, FINALITY, RIPENESS, TAKING AND STANDING ARE CONTRARY TO AND INCONSISTENT WITH THE DECISIONS OF THIS COURT

The lower courts held that with respect to the Kirshes' claims that their personal property had been taken and their home leased out to strangers in violation of their rights to substantive and procedural Due Process and to Just Compensation that the Kirshes had to first exhaust the state's remedies. In so holding, the lower courts disregarded decisions of this Court that exhaustion is not required under Section 1983. *Heck v. Humphrey*, 512 U.S. 477, 481, 483 (1994); *Monroe v. Pape*, 365 U.S. 167, 183 (1961). The issues rather are whether pre-deprivation or post-deprivation procedures were available and their adequacy. For example, in *Zinermon v. Burch*, 494 U.S. 113, 127-39 (1990) this Court held that post-deprivation remedies satisfy Due Process requirements only where pre-deprivation are impossible or impractical, and the possibility of erroneous deprivation unforeseeable.[56] Also disregarded was this Court's decision in *United States v. James Daniel Good Real Property*, 510 U. S. 43, 48-62 (1993) that the seizure of a home without pre-notice and a hearing absent the most exigent circumstances is a Due Process violation even where otherwise adequate post-deprivation remedies are available. Here the post-deprivation remedies are clearly inadequate.

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[56] Had the 7A Judgment been strictly complied with the 7A Administrator would have had to obtain prior court approval to remove the Kirshes property since it was not the original emergency work that had been authorized and the cost was likely to and did exceed the $3500.00 limitation. Also once the vacancy was created in October, the court had to be notified after 30 days that these rooms were vacant. While Samms denied any knowledge of what Weiss was doing, she did admit that she inspected the property after first reading in the monthly report that he was removing property from the ground floor rooms. It is likely that the compliance agreement or in a communication with HPD that she or some other City official, *e.g.*, the building inspector who accompanied Samms, was told his intent to clean out the ground floor rooms and lease them out.

The lower courts also held that City's keeping of their property in 7A Administration and the leasing out of their home were merely temporary takings lacking the finality to be ripe and actionable. But this Court has long recognized that temporary takings which deny the property owner of all use of his property fall within the Clause and require just compensation. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Ca.*, 492 U.S. 304, 318 (1987). Here the Kirshes have been denied all use and personal benefit of their property, its income and there home since 1988 and if, as alleged, the City's true intent is never to return their property to them, the taking then is permanent.[57] Such a result can not be said to be within the zone of their reasonable investment expectations since the 7A statute clearly contemplates return of control of the property to the owners immediately after the emergency repairs are made and otherwise required the property while under 7A Administration to be managed in strict compliance with the 7A Judgment and statute, with due regard for the owners' rights. (The 7A statute also doesn't provide for either the taking of property, real or personal, nor depriving the owners of the use and enjoyment of their home.)

Finally, the lower court's holding that the Kirshes lack standing to challenge the constitutionality of the 7A statute on its face or as applied is incomprehensible in light of the many decisions of this Court that injury in fact is the basic requirement for standing. *See generally, e.g., Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 1161-61, 137 L.Ed.2d 281 (1997). The Kirshes had been harmed, are being injured on an on-going basis and are continuing to be injured by the 7A Judgment and the actions complained of.

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[57] "Finality" for the purposes of determining if there has been a taking usually refers to a final agency decision. *See Sutum v. Tahoe Reg. Plan. Agency*, 520 U.S. 154, 117 S. Ct. 1159, 137 L.Ed.2d 980, 992-93 (1997). Also required to be considered in connection with the issues of ripeness, finality and exhaustion is the harm being suffered by the Kirshes. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-54 (1967). Here the Kirshes have been deprived for more than ten years of all personal use and benefit of their property's income and use and enjoyment of their home and have been impoverished and have suffered significant deprivations as a result.

III.

THE DECISION THAT THE PUNISHMENT IS NOT CONTRARY TO DUE PROCESS AND IN VIOLATION OF THE EIGHTH AMENDMENT IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS AND RAISES ISSUES WHICH THIS COURT SHOULD RESOLVE

The Kirshes claimed that the punishment imposed on them violated Eight Amendment limitations that punishment[58] not be cruel and unusual or excessive. They also challenged under the Due Process Clause the constitutionality of the imposition of a term of punishment under a statute that set forth no limit or range, but left it up to the discretion of the court and the imposition of a term of punishment that had no definite end.

With respect to the latter issue, the decision below is inconsistent with Third and Ninth Circuits which have held that punishment must come to an end at the completion of a set term. *Sample v. Decks,* 885 F.2d 1099, 1108 (3rd Cir. 1989); *Haygood v. Younger,* 769 F.2d 1350, 1354-58 (9th Cir. 1985) (en banc), *cert. denied,* 478 U.S. 1020 (1986). Here though the initial term of extended administration to punish the Kirshes was for "not shorter than five years," the term of punishment on its face had no set end or term. Now, after ten (10) years, the extended term has still not ended and, according to the City, the Kirshes must apply and justify its termination, a requirement not set forth in either the 7A statute or the 7A Judgment. In *State v. Huelsman,* 588 P.2d 394, 405 (Haw. 1988), the court declared a state statute unconstitutional where it gave the sentencing court full discretion to set the length of punishment without statutory guidelines or limits. The 7A statute has the same infirmity and the extended term of 7A Administration imposed as a punishment, with the contempt punishment of being

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[58] Given the purpose, severity and disproportionality of the punishment imposed to the acts of tenant harassment, the sanction was clearly penal in nature. *See, e.g., Austin v. United States,* 509 U.S. 602, 609-10 (1993); *United States v. Halper,* 490 U.S. 435, 442-50 (1989); *Ballew v. Georgia,* 435 U.S. 223, 229 (1978); *Baldwin v. New York,* 399 U.S. 66, 68-69 (1970).

barred from going ½ mile of the building, has no set end. The court here had full and uncircumscribed discretion to impose a term as it saw fit and the one imposed has no fixed and definite end.

Whether a remedial statute containing a provision for punishment must comply with traditional Due Process requirements respecting fair notice of the proscribed conduct and the type, duration and maximums allowed as punishment for each type of proscribed conduct according to its gravity,[59] is an important issue this Court which should address.[60] Here the Kirshes' being deprived of their property and its income,[61] being barred from their home for more than ten years lacks any proportionality to the acts of tenant harassment that they were charged with. *See generally, United States v. Bajakajian*, ___ U.S. ___, 118 S. Ct. 2028, 2036-38, 141 L.Ed.2d 314 (1998); *Austin v. United States*, 509 U.S. 602, 609-10 (1993). In addition there is no legislative determination as to the length and exact nature of the appropriate punishment or the factors to be applied. *Cf. Solem v. Helm*, 463 U.S. 277, 290 (1983) ("Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes"). Here punishment was arbitrarily imposed—*i.e.*, without regard to any statutory standards or guidelines!

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[59] *See generally, Bouie v. City of Columbia*, 378 U.S. 347, 351-56 (1964); *see also Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925).

[60] The District Court in holding that the Eighth Amendment did not apply erroneously assumed that the Kirshes could themselves correct the conditions that led to the imposition of 7A Administration when they could not: they were barred from the property and prohibited from interfering with its management. In addition, the District Court ignored the fact that those conditions had long before been corrected.

[61] Denying the Kirshes any personal use and benefit of their property's income is equivalent to a confiscation, fine or forfeiture.

CONCLUSION

This case represents a governmental program of questionable constitutional validity that has gone seriously awry and has resulted in egregious violations of fundamental constitutional property and personal rights. What happened to Kirshes is shocking and disturbing. This Court should grant the Kirshs' Petition for a Writ of Certiorari to clarify the law and provide appropriate guidance to the federal courts below and in other circuits.

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Respectfully submitted,

RICHARD P. CARO, ESQ.
3 East Quincy Street
Riverside, Illinois 60546
(708) 447-5434

Counsel of Record
for Petitioners